

Joseph R. Saveri (State Bar No. 130064)
Eric B. Fastiff (State Bar No. 182260)
Brendan P. Glackin (State Bar No. 199643)
Dean M. Harvey (State Bar No. 250298)
Anne B. Shaver (State Bar No. 255928)
Katherine M. Lehe (State Bar No. 273472)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Interim Lead Counsel for Plaintiffs and the Proposed Class

[Additional counsel listed on signature page]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: October 26, 2011
Time: 2:00 p.m.
Courtroom: 8, 4th Floor
Judge: The Honorable Lucy H. Koh

TABLE OF CONTENTS

	<u>Page</u>
I. Facts	1
A. Plaintiffs' Statement	1
B. Defendants' Statement	3
II. Legal Issues	5
III. Jurisdiction and Service	6
IV. Motions	7
A. Discovery Dispute Joint Report #1	7
B. Defendant Lucasfilm's Motion to Dismiss the State Law Claims	9
C. Defendants' Joint Motion to Dismiss the Complaint	9
D. Defendants' Joint Motion for Temporary Stay of Discovery	10
V. Amendment of Pleadings	11
VI. Evidence Preservation	11
VII. Disclosures	12
VIII. Discovery	12
A. Plaintiffs' Position	12
B. Defendants' Position	13
IX. Class Certification	15
X. Related Cases	15
XI. Relief	16
XII. Settlement and ADR	16
XIII. Consent to Magistrate Judge For All Purposes	16
XIV. Other References	16
XV. Narrowing of Issues	16
XVI. Expedited Schedule	17
XVII. Scheduling	18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS
(continued)

	<u>Page</u>
A. Plaintiffs’ Position	18
B. Defendants’ Position.....	20
XVIII. Trial 21	
XIX. Disclosure of Non-party interested Entities or Persons	21

The parties to these consolidated actions hereby submit this joint statement in advance of the October 26, 2011 Case Management Conference.

I. Facts

A. Plaintiffs' Statement

This is a consolidated class action in which five individual and representative plaintiffs ("Plaintiffs") challenge a conspiracy among Defendants to fix and suppress the compensation of their employees.¹ The Complaint alleges that Defendants entered into: (1) illegal agreements not to recruit each other's employees; (2) illegal agreements to notify each other when making an offer to another's employee; and (3) illegal agreements that, when offering a position to another company's employee, neither company would counteroffer above the initial offer. (Complaint ¶¶ 55-107.) Plaintiffs seek injunctive relief and damages for violations of: Section 1 of the Sherman Act, 15 U.S.C. § 1; the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720, *et seq.*; Cal. Bus. & Prof. Code § 16600; and Cal. Bus. & Prof. Code §§ 17200, *et seq.* (Complaint ¶¶ 119-164.)

This action follows an investigation by the Antitrust Division of the United States Department of Justice ("DOJ"). Beginning in approximately 2009, the DOJ conducted an investigation into the employment practices of Defendants. The DOJ issued Civil Investigative Demands to Defendants that resulted in Defendants producing responsive documents to the DOJ. The DOJ also interviewed witnesses to certain of the agreements alleged in Plaintiffs' Complaint.

¹ The litigation commenced on May 4, 2011 when Plaintiff Hariharan filed his complaint in Alameda County Superior Court. On May 23, 2011, Defendants removed the *Hariharan* case to U.S. District Court for the Northern District of California. (Dkt. No. 1.) Four cases were later filed in Santa Clara County Superior Court, each of which Defendants subsequently removed. On July 27, 2011, all five cases were related before Judge Armstrong. (Dkt. No. 52.) On August 4, 2011, Judge Armstrong granted Plaintiffs' motion to transfer all five cases to the San Jose Division. (Dkt. No. 58.) Pursuant to Stipulated Pretrial Order No. 1 as Modified, all five cases were consolidated on September 12, 2011. (Dkt. No. 64.) Plaintiffs served their Consolidated Amended Complaint on September 2, 2011. (*See* Dkt. No. 64 at 6.) Pretrial Order No. 1 provides for a briefing schedule on Defendants' motion to dismiss: Defendants' motion to dismiss is due by October 13, 2011; Plaintiffs' opposition is due by November 4, 2011; and Defendants' reply is due by December 2, 2011. The hearing on Defendants' motion to dismiss is currently scheduled for January 26, 2012.

1 The DOJ concluded that Defendants agreed to eliminate forms of competition among each
2 other for skilled labor in violation of federal antitrust law. “Defendants’ concerted behavior both
3 reduced their ability to compete for employees and disrupted the normal price-setting
4 mechanisms that apply in the labor setting.” DOJ Competitive Impact Statement at 10, Dkt.
5 No. 2, *United States v. Adobe Systems Inc., et al.*, No. 10-cv-1629-RBW (D.D.C. Sept. 24, 2010)
6 (regarding agreements among all defendants but Lucasfilm). *See also* DOJ Competitive Impact
7 Statement at 8, Dkt. No. 2, *United States v. Lucasfilm LTD.*, No. 10-cv-2220-RBW (D.D.C.
8 Dec. 21, 2010) (regarding agreements between Lucasfilm and Pixar). The DOJ found that these
9 agreements are “per se unlawful under Section 1 of the Sherman Act” and are “facially
10 anticompetitive because they eliminated a significant form of competition to attract high-tech
11 employees, and, overall, substantially diminished competition to the detriment of the affected
12 employees who were likely deprived of competitive important information and access to better
13 job opportunities.” DOJ Competitive Impact Statement at 3, *United States v. Adobe Systems Inc.,*
14 *et al., supra.*

15 The DOJ filed suit on September 24, 2010 (against all Defendants but Lucasfilm) and on
16 December 21, 2010 (against Lucasfilm). At the same time, the DOJ filed stipulated proposed
17 final judgments in which Defendants agreed not to enter into similar agreements in the future, and
18 agreed to a variety of mandatory procedures to ensure Defendants’ compliance. [Proposed] Final
19 Judgment, Dkt. No. 3-1, *United States v. Adobe Systems Inc., et al.*, No. 10-cv-1629-RBW
20 (D.D.C. Sept. 24, 2010). The Defendants stipulated that the DOJ’s complaint “states a claim
21 upon which relief may be granted against the Defendants under Section One of the Sherman Act,
22 as amended, 15 U.S.C. § 1.” *Id.* at 3. The court entered the proposed final judgments on
23 March 18, 2011 (regarding all Defendants but Lucasfilm), and on June 3, 2011 (regarding
24 Lucasfilm).

25 While the final judgments may have been designed to prevent recurrence of Defendants’
26 illegal conduct, they did not provide any compensation to the employees who were harmed as a
27 result of Defendants’ agreements. The DOJ left this to private litigants. *See* DOJ Competitive
28

1 Impact Statement at 15, *United States v. Adobe Systems Inc., et al., supra* (“Remedies Available
2 to Potential Private Litigants”).

3 This consolidated class action seeks to compensate the individuals Defendants harmed
4 through their illegal agreements. To date, the only private cases addressing Defendants’ conduct
5 are the five class actions consolidated in the instant action. Without this consolidated class
6 action, Plaintiffs and the Class will not receive compensation for their injuries, and Defendants
7 will continue to retain the benefits of their unlawful collusion.

8 **B. Defendants’ Statement**

9 Plaintiffs filed this complaint on the heels of civil settlements that Defendants reached
10 with the United States Department of Justice relating to employee recruiting practices. As part of
11 those settlements, in which Defendants admitted no wrongdoing, DOJ alleged that various pairs
12 of Defendants entered into six discrete, bilateral agreements spread out over a 2 1/2-year period
13 not to “cold call” each others’ employees. In each instance, the DOJ complaint alleged
14 agreements involving only two companies and, with one exception, nothing other than an
15 agreement not to “cold call” each other’s employees. As even DOJ recognized, such non-
16 solicitation agreements can be pro-competitive and lawful to prevent poaching of employees in
17 the context of legitimate collaborative projects, and the civil settlements spell out the
18 circumstances in which they are not prohibited.

19 Plaintiffs copy the factual allegations relating to the six bilateral agreements virtually
20 word-for-word from the DOJ complaint, with one critical difference: Apparently recognizing the
21 implausibility of alleging that those agreements harmed them, much less a class of all of
22 Defendants’ employees, Plaintiffs instead claim that Defendants entered into a multilateral
23 “overarching” conspiracy among all of them to suppress wages for all of their employees
24 nationwide over a five-year period.

25 Defendants entered into stipulated proposed judgments with the DOJ, pursuant to which
26 they agreed not to engage in non-solicitation agreements except under certain circumstances.
27 (Compl. ¶ 115.) Defendants specifically did not admit to any wrongdoing or violation of law.
28

1 (Final Judgments at 2.) These stipulated judgments carry no prima facie effect in related civil
2 litigation. *See* 15 U.S.C. § 16(a); *United States v. Nat'l Ass'n of Broadcasters*, 553 F. Supp. 621,
3 623 & n.5 (D.D.C. 1982) (holding that private antitrust actions may not give prima facie effect to
4 government consent decrees entered before oral testimony was taken).

5 The DOJ alleged in its complaints filed as part of the consent decrees that its investigation
6 focused on five discrete, bilateral no-cold-call agreements among pairs of Defendants Adobe,
7 Apple, Google, Intel, Intuit, and Pixar (*id.* ¶ 1), later adding a similar complaint and consent
8 decree regarding an alleged bilateral agreement between Lucasfilm and Pixar. Both stipulated
9 judgments recognize that there are many circumstances under which Defendants may legitimately
10 agree not to cold call each other's employees. (Final Judgments at section V.) For example,
11 Defendants are free to use such agreements to the extent they are reasonably necessary for the
12 functioning of legitimate collaboration agreements; for a wide range of business transactions; in
13 contracts with consultants, auditors, vendors, recruiting agencies, or providers of temporary or
14 contract employees; in settlement or compromise of legal disputes; and employment or severance
15 agreements with their employees (*id.*).

16 Shortly after the Court entered the DOJ consent decrees, Plaintiff Siddharth Hariharan
17 filed the first in a series of complaints against the same seven companies that had entered into
18 consent decrees with DOJ. Hariharan alleged that he worked for Lucasfilm as a software
19 engineer for approximately seventeen months, from mid-January 2007 through mid-August 2008.
20 (Compl. ¶ 18.) Thereafter, Plaintiffs Michael Devine, Brandon Marshall, Mark Fitchner, and
21 Daniel Stover filed similar complaints. These additional Plaintiffs alleged that they worked as
22 software engineers at various times for three of the seven Defendants (Adobe, Intel, and Intuit) in
23 three different states (California, Arizona, and Washington). (*Id.* ¶¶ 16-20.) The complaints were
24 assigned to this Court in August 2011, and Plaintiffs thereafter filed a superseding Consolidated
25 Amended Complaint.

26 Defendants are seven companies—Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and
27 Pixar—described in the Complaint as belonging to an undefined group of “high technology
28

companies.” (*Id.* ¶ 43.) With one significant exception, Plaintiffs’ factual allegations are taken wholesale, and often verbatim, from the factual allegations in the DOJ complaints. According to the Complaint, Defendants allegedly entered into six bilateral agreements over a two-year period “not to cold call each others’ employees.” (*Id.* ¶¶ 59, 73, 79, 85, 98, 104.) Contrary to the DOJ complaints, however, and without stating any facts to support such a claim, Plaintiffs contend that these agreements constituted an “an interconnected web of express agreements” amounting to an “overarching conspiracy” between Defendants. (*Id.* ¶ 55.)

Based on these allegations, the Complaint asserts claims under Section 1 of the Sherman Act, California’s Cartwright Act, and Sections 16600 and 17200 of the California Business and Professions Code. (*Id.* ¶ 5.) Plaintiffs seek to represent a class of all “salaried” employees of Defendants over a five-year period regardless of the positions they held, with exclusions for retail employees and Defendants’ corporate officers, board members, and senior executives. (*Id.* ¶ 30.) By its terms, the class would include not only software engineers like the named plaintiffs, but also secretaries, accounting personnel, in-house counsel, and Intel’s fabrication workers. Based on Defendants’ initial inquiry, this putative class would total more than 83,300 members, spread across the United States.

II. Legal Issues

The legal issues in this case include the following:

1. Defendants contest whether Plaintiffs’ Complaint has stated viable causes of action under the Sherman Act, the Cartwright Act, and California Business & Professions Code Sections 16600 and 17200. Defendants filed a joint motion to dismiss the Complaint on October 13, 2011 (Dkt. No. 79), in accordance with the schedule established in Stipulated Pretrial Order No. 1 as Modified (Dkt. No. 64). Defendants contend that the Complaint should be dismissed for failure to state a claim upon which relief can be granted and because Plaintiffs lack standing to assert claims for injunctive or declaratory relief. Defendant Lucasfilm filed a separate motion to dismiss the state-law claims based on federal enclave jurisdiction (Dkt. No. 77), which all the other Defendants joined (Dkt. No. 79 at 1 n.1.).

1 Plaintiffs oppose the joint motion to dismiss and Lucasfilm's separate motion, contending
 2 that the Complaint satisfies Rule 8. Plaintiffs believe that, at most, Defendants raise disputed
 3 issues of fact that cannot be properly resolved on a Rule 12 motion.

4 2. Defendants contest whether the proposed class of all "salaried" employees of
 5 Defendants from January 1, 2005 through January 1, 2010 may be certified, and whether
 6 Plaintiffs would adequately represent such a class. Plaintiffs intend to move for class certification
 7 under Rule 23 and observe that class actions are commonly certified in antitrust cases alleging
 8 horizontal agreements among competitors. *See, e.g., In re Rubber Chems. Antitrust Litig.*, 232
 9 F.R.D. 346, 350 (N.D. Cal. 2005) (Jenkins, J.) ("Class actions play an important role in the
 10 private enforcement of antitrust actions'... 'For this reason, courts resolve doubts in these actions
 11 in favor of certifying the class'... 'a class-action lawsuit is the most fair and efficient means of
 12 enforcing the law where antitrust violations have been continuous, widespread, and detrimental to
 13 as yet unidentified [victims].'" (citations omitted).

14 Defendants dispute that the putative class identified in Plaintiffs' Complaint can be either
 15 certified or maintained under Rule 23 and will oppose Plaintiffs' motion for class certification.
 16 *See, e.g., Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 615-24 (2010) (describing "rigorous
 17 analysis" the district court must conduct to determine that the prerequisites of Rule 23 have been
 18 met in large employment class action).

19 3. If Plaintiffs' claims survive the pleading stage, Defendants anticipate bringing one or
 20 more motions for summary judgment, which may raise additional legal issues, including
 21 Defendants' contention that Plaintiffs' claims should be judged under a rule of reason analysis.

22 **III. Jurisdiction and Service**

23 The Court has subject matter jurisdiction pursuant to Sections 4 and 16 of the Clayton Act
 24 (15 U.S.C. §§ 15 and 26) and 28 U.S.C. §§ 1331, 1332(a), 1332(d), 1337 and 1367.

25 Venue is proper in this judicial district pursuant to Section 12 of the Clayton Act
 26 (15 U.S.C. § 22) and 28 U.S.C. § 1391(b), (c), and (d) because a substantial part of the alleged
 27 events giving rise to Plaintiffs' claims occurred in this district, a substantial portion of the
 28

1 allegedly affected interstate trade and commerce was carried out in this district, and all of the
2 Defendants reside in this district.

3 Defendants are subject to the jurisdiction of this Court by virtue of their contacts in this
4 district.

5 All Defendants have accepted service of Plaintiffs' Consolidated Amended Complaint
6 ("Complaint"). No parties remain to be served.

7 Defendant Lucasfilm's motion to dismiss disputes whether this Court has subject matter
8 jurisdiction over Plaintiffs' claims under the Cartwright Act, California Business and Professions
9 Code §§ 16720, *et seq.*; and California Business and Professions Code §§ 17200, *et seq.* (Dkt.
10 No. 77.) All the other Defendants joined in Lucasfilm's motion. (Dkt. 79, at 1 n.1.) Plaintiffs
11 oppose Lucasfilm's motion. Defendants do not dispute this Court's subject matter jurisdiction
12 over Plaintiffs' claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, or California Business
13 and Professions Code § 16600.

14 **IV. Motions**

15 There are four pending matters before the Court: (1) Defendants' Joint Motion to Dismiss
16 (Dkt. No. 79); (2) Defendant Lucasfilm's Motion to Dismiss (Dkt. No. 77); (3) Discovery Dispute
17 Joint Report #1 (Dkt. No. 76); and (4) Defendants' Joint Motion for Temporary Stay of Discovery
18 (Dkt. No. 80).

19 If Plaintiffs' claims survive past the pleading stage, Defendants anticipate bringing one or
20 more motions for summary judgment.

21 Plaintiffs will file a motion to certify the proposed class under Rule 23 following
22 sufficient discovery.

23 **A. Discovery Dispute Joint Report #1**

24 Discovery Dispute Joint Report #1, which is pending before Judge Lloyd, addresses the
25 parties' dispute over whether discovery in this action should proceed pending a ruling on
26 Defendants' joint motion to dismiss the Complaint. The Report also addresses the parties'
27 dispute over whether the issue should be decided by Judge Lloyd (Plaintiffs' position), or decided
28

1 by the Court (Defendants' position) through either: (1) adjudication of Defendants' motion for
2 temporary stay (Dkt. No. 80); or alternatively (2) at the initial case management conference.
3 Plaintiffs seek an order stating that discovery in this action should proceed without further delay.
4 Defendants have filed a motion for temporary stay of discovery pending a ruling on Defendants'
5 Joint Motion to Dismiss.

6 In the interests of efficiency, Plaintiffs have suggested discovery should commence with
7 production of documents Defendants have already produced to the DOJ and identification of
8 percipient witnesses.

9 **Defendants' Position:** Defendants have informed Plaintiffs that they intend to comply
10 fully with discovery deadlines pending resolution of the motion for temporary stay. To this end,
11 Defendants have agreed to serve initial disclosures by October 24, 2011; provide comments and
12 finalize Plaintiffs' draft protective order, ESI production specification, and stipulation regarding
13 expert discovery; and schedule additional conferences to discuss issues regarding electronically
14 stored information. Beyond these activities, Defendants' position is that a temporary stay of
15 discovery would promote efficiency and judicial economy, avoiding the expenditure of time and
16 resources on discovery disputes (including likely disputes regarding the discoverability of
17 documents previously produced to the government) on matters that will be rendered moot if the
18 Court grants Defendants' motion to dismiss. Defendants' motion to dismiss targets all of
19 Plaintiffs' claims, whether grounded on allegations of bilateral agreements or an "overarching"
20 conspiracy.

21 **Plaintiffs' Position:** Plaintiffs oppose Defendants' requested stay because it will only
22 introduce unnecessary cost and delay. Defendants' motions to dismiss will not and cannot
23 dispose of this case. Plaintiffs do not agree that their claim is limited to an allegation of a single
24 agreement among all Defendants, or that the precise shape of the conspiracy is a question that can
25 be resolved at the pleading stage. Plaintiffs contend that Defendants concede that the complaint
26 sufficiently alleges the existence of unlawful bilateral agreements among them, in addition to
27 alleging an overarching conspiracy served by those agreements; and that this by itself requires
28

denial of their joint motion to dismiss. Moreover, Defendants' contention that Plaintiffs have not suffered injury-in-fact is not appropriate for resolution on a motion to dismiss.

B. Defendant Lucasfilm's Motion to Dismiss the State Law Claims

Lucasfilm's motion to dismiss seeks to dismiss Plaintiffs' Cartwright Act and UCL claims under the federal enclave doctrine. (Dkt. No. 77.) Lucasfilm is located on the Presidio of San Francisco, a federal enclave that was ceded to the United States government by the State of California in 1897. Accordingly, under the federal enclave doctrine, Lucasfilm's conduct on that enclave is governed exclusively by federal law. Lucasfilm contends that Plaintiffs cannot maintain claims based on alleged conduct on that enclave under the Cartwright Act or the UCL, both California statutes that were enacted after the Presidio became federal property. All other Defendants have joined Lucasfilm's motion. (Dkt. 79 at 1 n.1.) Plaintiffs oppose the motion. Plaintiffs' opposition is due November 4, 2011; and Lucasfilm's reply is due December 2, 2011. (*Id.*) The hearing on Lucasfilm's Motion to Dismiss is scheduled for January 26, 2012.

C. Defendants' Joint Motion to Dismiss the Complaint

Defendants' joint motion to dismiss the Complaint seeks dismissal on four grounds (Dkt. No. 79.):

1. The Complaint fails to state a claim upon which relief may be granted under the Sherman Act or California's Cartwright Act because it fails to allege evidentiary facts supporting the claim of an "overarching conspiracy" among all Defendants to suppress the wages of their employees, such a conspiracy is implausible on its face, and the Complaint fails to allege facts to support a claim of injury, either from bilateral agreements or from an "overarching" conspiracy.

2. The Complaint fails to state a claim upon which relief may be granted under California Business and Professions Code § 16600 because it fails to allege that any Defendants restrained employment by agreeing not to hire each others' employees.

3. The Complaint fails to state a claim upon which relief may be granted under California Business and Professions Code § 17200 because it does not adequately plead unfair

1 competition, Plaintiffs have not lost money or property, and Plaintiffs are ineligible for any of the
2 remedies available under section 17200.

3 4. Plaintiffs lack standing to assert claims for injunctive or declaratory relief because
4 they are former employees with no stated intention of working for any Defendant, and the alleged
5 conduct has already been enjoined by the DOJ consent decrees.

6 Plaintiffs oppose the joint motion.

7 Plaintiffs' opposition is due November 4, 2011; and Defendants' reply is due December 2,
8 2011. (*Id.*) The hearing on Defendants' Motion to Dismiss is also scheduled for January 26,
9 2012.

10 **D. Defendants' Joint Motion for Temporary Stay of Discovery**

11 **Defendants' Position:** Defendants' Joint Motion for Temporary Stay (Dkt. No. 80) seeks
12 a temporary stay of discovery pending the Court's ruling on Defendants' joint motion to dismiss.
13 If granted, Defendants' motion to dismiss would dispose of all claims asserted, and it requires no
14 discovery for its adjudication. On this basis alone, Defendants believe that their motion for a
15 temporary stay should be granted. Moreover, Defendants believe that, as recognized by the
16 Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), a temporary stay is
17 particularly appropriate in complex antitrust cases such as this one, where the burden of requiring
18 Defendants to engage in broad, costly and invasive discovery should only be shouldered if this
19 Court determines that Plaintiffs can plead a viable claim.

20 **Plaintiffs' Position:** Plaintiffs oppose the motion. Plaintiffs believe that this case bears
21 no resemblance to *Twombly*, in which the plaintiffs failed to allege facts plausibly suggesting the
22 defendants had violated the antitrust laws. Here, the defendants have entered into stipulated
23 judgments with the Department of Justice in cases alleging they violated the Sherman Act.

24 Plaintiffs do not agree that Defendants' motion, as framed, is proper or can dispose of all
25 claims in the case. Plaintiffs' claim is not limited to allegation of a single agreement among all
26 Defendants, and the precise shape of the conspiracy is not a question that can be resolved at the
27

1 pleading stage but must be reserved for trial. Defendants' motion will not dispose of the case and
2 Defendants' requested stay will simply introduce unnecessary cost and delay.

3 Plaintiffs' opposition is due October 27, and Defendants' reply will be due seven days
4 after Plaintiffs' opposition is filed. The hearing on Defendants' Motion for Temporary Stay is
5 scheduled for December 8, 2011.

6 **V. Amendment of Pleadings**

7 Plaintiffs do not expect parties, claims, or defenses to be added or dismissed at this time,
8 unless discovery reveals the existence of additional conspirators or parties to the illicit
9 agreements. Defendants propose a deadline of May 15, 2012 for amending the pleadings.

10 **VI. Evidence Preservation**

11 Plaintiffs' position on evidence preservation is as follows. On September 27, 2011,
12 Plaintiffs wrote Defendants regarding the preservation of evidence. Defendants did not respond.
13 At the parties' Rule 26(f) conference on October 3, 2011, Plaintiffs' counsel again asked
14 Defendants' counsel to explain the "[s]teps they have taken to preserve evidence relevant to the
15 issues reasonably evidence in this action, including interdiction of any document-destruction
16 program and any ongoing erasures of e-mails, voice mails, and other electronically-recorded
17 material." Standing Order For All Judges Of The Northern District of California: Contents Of
18 Joint Case Management Statement, at 1. Defendants' counsel refused to discuss the issue.
19 Defendants have since agreed to schedule individual follow-up conferences to address these and
20 other issues under Rule 26.

21 Defendants respond as follows. At the Rule 26(f) conference, Defendants' counsel
22 explained to Plaintiffs that Defendants had each taken reasonable steps to preserve documents,
23 data, and tangible things containing information potentially relevant to the subject matter of this
24 litigation as required by the Stipulated Pretrial Order (Dkt. No. 21 at 6). In a subsequent meeting
25 on October 7, Defendants agreed to schedule additional conferences to discuss issues regarding
26 electronically stored information. Those conferences are scheduled to begin the week of October
27 17.

1 Plaintiffs state that they have preserved evidence. According to Plaintiffs' counsel, each
2 individual and representative plaintiff has been instructed by Plaintiffs' counsel to preserve all
3 evidence in their possession, custody, or control that is relevant to the issues reasonably evident in
4 this action, including any emails, voice mails, and other electronically-recorded material.
5 Plaintiffs' counsel has confirmed they are preserving and maintaining all evidence reasonably
6 relevant, including both electronic documents and hard copy documents.

7 Defendants state that they understand their legal obligations to preserve evidence and have
8 each taken reasonable steps to preserve documents, data, and tangible things in their possession,
9 custody, or control containing information potentially relevant to the subject matter of this
10 litigation. According to Defendants' counsel, Defendants have issued document hold memoranda
11 instructing potential custodians likely to have such information to preserve it and have otherwise
12 taken reasonable steps to preserve electronically stored information and hard copy documents.

13 **VII. Disclosures**

14 Plaintiffs served their initial disclosures on October 17, 2011. Plaintiffs' disclosures listed
15 individuals likely to have discoverable information that Plaintiffs may use to support their claims
16 and allegations, and categories of documents, electronically stored information, and tangible
17 things that Plaintiffs have in their possession, custody, or control and may use to support their
18 claims.

19 As a courtesy, Plaintiffs agreed to Defendants' request to extend their deadline to serve
20 initial disclosures by one week. Defendants will serve their initial disclosures on October 24,
21 2011.

22 **VIII. Discovery**

23 **A. Plaintiffs' Position**

24 Despite Plaintiffs' efforts over the past five months, no discovery has been taken to date.
25 Defendants' refusal to participate in discovery is the subject of the pending Discovery Dispute
26 Joint Report #1.

1 Before Defendants removed Plaintiffs' first-filed case, Plaintiff Hariharan served all
2 Defendants on May 16, 2011 with production requests that asked for documents produced to the
3 DOJ. Defendants have never responded to these requests or sought relief from the Court from
4 their obligation to respond. After removal, Plaintiffs again asked Defendants to produce
5 documents they produced to the DOJ. Defendants refused. On August 19, 2011, Plaintiffs asked
6 Defendants to schedule a Rule 26(f) conference "as soon as practicable." Fed. R. Civ. P. 26(f)(1).
7 Defendants refused to meet until October 3, 2011.

8 Meanwhile, Plaintiffs agreed, as a courtesy, to extend Defendants' deadline to respond to
9 the original complaints three times. (May 26, 2011 Stipulation Extending Time To Respond To
10 Complaint, Dkt. No. 17; July 22, 2011 Stipulation Extending Time To Respond To Complaint,
11 Dkt. No. 48; September 6, 2011 Stipulated [Proposed] Pretrial Order No. 1, Dkt. No. 63.)

12 At the Rule 26(f) conference on October 3, 2011, Defendants' counsel were unprepared
13 and refused to discuss topics required by Rule 26 and the applicable standing orders. Defendants
14 confirmed they will refuse to produce documents or identify percipient witnesses unless the Court
15 orders otherwise. Plaintiffs served further document requests on Defendants asking for
16 documents produced to the DOJ (among other things) on October 3, 2011, following the
17 Rule 26(f) conference. Defendants' refusal to comply with their Rule 26 obligations is the
18 subject of Discovery Dispute Joint Report #1, currently pending before Magistrate Judge Lloyd.

19 As explained above, Plaintiffs seek an order requiring that discovery proceed without
20 further delay. Plaintiffs have suggested in their report to Magistrate Judge Lloyd that discovery
21 may commence with production of documents Defendants have already produced to the DOJ and
22 identification of percipient witnesses.

23 **B. Defendants' Position**

24 Plaintiffs' statement mischaracterizes the discovery process in several ways. Defendants
25 have cooperated, and will continue to cooperate, with Plaintiffs in discovery while preserving
26 their position that discovery should be temporarily stayed pending a ruling on their joint motion
27 to dismiss. Plaintiffs served discovery on October 3, 2011 that is massive in scope and
28

1 enormously complex, seeking wide-ranging discovery related to nearly every aspect of
2 Defendants' recruiting, hiring, promotion, and compensation practices for all of their employees
3 nationwide for over a ten-year period. Defendants' responses are not due until November 7,
4 2011.² Thus, Plaintiffs' insistence that Defendants have refused to respond to discovery is simply
5 wrong.

6 At the Rule 26(f) conference, Defendants were prepared to, and did, discuss case
7 management topics, including how discovery should proceed in this case, the schedule of the
8 case, and the fact that they had taken reasonable steps to preserve evidence, including
9 electronically stored information, that might be relevant to this litigation. Indeed, the parties met
10 for two hours about case management and discovery issues. Defendants informed Plaintiffs that
11 they would file a motion for temporary stay of discovery pending resolution of the joint motion to
12 dismiss and would raise the issue as part of setting the schedule for the case at the initial case
13 management conference. Defendants informed Plaintiffs that they anticipated no difficulties
14 reaching agreement on a protective order, ESI production specification, and a stipulation
15 regarding expert discovery.

16 On October 7, the parties met again regarding Defendants' intention to file a motion for
17 temporary stay of discovery along with the joint motion to dismiss. Defendants offered to
18 stipulate to an expedited briefing schedule on the motion for temporary stay. Further, Defendants
19 indicated that they intend to fully comply with discovery deadlines pending resolution of the
20 motion for temporary stay. To that end, Defendants agreed to exchange initial disclosures;
21 provide comments and finalize Plaintiffs' draft protective order, ESI production specifications,
22 and stipulation regarding expert discovery; and schedule additional conferences to discuss issues
23 regarding electronically stored information.

24
25 ² Discovery served after Plaintiffs' counsel filed the first case in state court was without any force
26 or effect after Defendants' removed the case to federal court. While the parties negotiated
27 jurisdictional discovery related to Plaintiffs' potential remand motion, Plaintiffs agreed to an
28 "open ended extension" of time. Because the Parties agreed that "[D]efendants do not have an
obligation to respond to the state court discovery until 30 days following any order by a federal
court to remand the case," and Plaintiffs decided not to move to remand to state court, Defendants
had no obligation to respond further to Plaintiffs' state court discovery.

1 **IX. Class Certification**

2 **Plaintiffs' Position:** Plaintiffs propose that the following class be certified pursuant to
3 Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3):

4 All natural persons employed by Defendants in the United States on
5 a salaried basis during the period from January 1, 2005 through
6 January 1, 2010 (the "Class Period"). Excluded from the Class are:
7 retail employees; corporate officers, members of the boards of
8 directors, and senior executives of Defendants who entered into the
illicit agreements alleged herein; and any and all judges and
justices, and chambers' staff, assigned to hear or adjudicate any
aspect of this litigation.

9 (Complaint ¶ 30.) Plaintiffs will file a motion for class certification as early as possible following
10 sufficient discovery. As noted above, courts have routinely recognized that class actions are an
11 important mechanism for ensuring enforcement of the antitrust laws and to provide compensation
12 to victims, and this case is no different.

13 **Defendants' Position:** As explained above, Defendants contend that Plaintiffs'
14 Complaint fails to state a claim upon which relief can be granted. Should any of Plaintiffs'
15 claims survive Defendants' joint motion to dismiss, Defendants will oppose class certification on
16 the ground that the class proposed does not meet the requirements for class certification.

17 **X. Related Cases**

18 On October 18, 2011, Plaintiffs' counsel filed a Freedom of Information Act action
19 against the DOJ seeking, among other things, documents Defendants provided to the DOJ, and
20 which (as with all other documentary discovery) Defendants oppose producing pending resolution
21 of their motion to stay discovery: *Lieff, Cabraser, Heimann & Bernstein, LLP v. U.S. Department*
22 *of Justice, Antitrust Division*, Case No. 11-cv-05105-HRL. Plaintiffs have asked Defendants to
23 stipulate to a proposed order relating this case to the above-captioned action.

24 Both of the DOJ's civil actions against Defendants have been closed and the stipulated
25 final judgments have been entered. See Final Judgment, Dkt. No. 17, *United States v. Adobe*
26 *Systems Inc., et al.*, No. 10-cv-1629-RBW (D.D.C. Mar. 18, 2011) (regarding agreements among
27 all defendants but Lucasfilm); Order Granting Motion For Entry Of Final Judgment, Dkt. No. 7,
28

1 *United States v. Lucasfilm LTD.*, No. 10-cv-2220-RBW (D.D.C. Jun. 3, 2011). The District Court
 2 for the District of Columbia has entered injunctions prohibiting the actions Plaintiffs ask this
 3 Court to enjoin and has retained jurisdiction to enforce its orders. (*Id.*)

4 **XI. Relief**

5 Plaintiffs, on their own behalf and on behalf of the Class they seek to represent, seek
 6 damages to the maximum extent authorized by applicable federal and California law, including
 7 treble damages, rescission, and restitution as authorized by law and according to proof at trial.
 8 Plaintiffs also seek injunctive and declaratory relief and attorneys' fees and costs. Defendants
 9 dispute that any Plaintiff, or any member of the putative class, has been harmed in any way, and
 10 also dispute that any Plaintiff, or member of the putative class, is entitled to any damages at all.

11 **XII. Settlement and ADR**

12 No settlement discussions have taken place. The parties have discussed ADR and do not
 13 believe that it is appropriate at this time.

14 **XIII. Consent to Magistrate Judge For All Purposes**

15 The parties do not consent to have a magistrate judge conduct all further proceedings in
 16 this case.

17 **XIV. Other References**

18 The parties do not believe that this case is suitable for reference to binding arbitration, a
 19 special master, or the Judicial Panel on Multidistrict Litigation.

20 **XV. Narrowing of Issues**

21 Plaintiffs believe discovery will confirm the facts alleged in the Complaint and described
 22 in the stipulated final judgments entered in the DOJ actions. Plaintiffs contend this conduct is
 23 illegal *per se* under federal and California antitrust law. Plaintiffs expect to establish the
 24 predicate acts quickly, if Defendants identify percipient witnesses and produce the documents
 25 they already produced to the DOJ.

26 As detailed in the Joint Motion to Dismiss, Defendants believe the motion should dispose
 27 of the entirety of Plaintiffs' Complaint and respectfully request that the Court consider the issues
 28

1 presented in those motions at the earliest possible date. Plaintiffs have merely alleged the
2 existence of six independent agreements, each involving only two companies. Plaintiffs fail to
3 allege any facts that could plausibly convert these bilateral agreements into the overarching
4 conspiracy Plaintiffs have alleged existed among Defendants to suppress the wages of all their
5 employees nationwide over a five-year period. And Plaintiffs similarly fail to allege any facts
6 establishing injury, either from bilateral agreements or from an “overarching” conspiracy, nor can
7 they, given that any relevant labor market that could possibly include members of the putative
8 class would be much broader than the seven named Defendants. Although it is not necessary to
9 reach this issue to resolve Defendants’ joint motion to dismiss, Defendants note that they do not
10 concede that the alleged bilateral agreements constitute *per se* violations under federal and
11 California antitrust law. In fact, courts have repeatedly evaluated non-solicitation agreements
12 under a rule of reason analysis and held them to be pro-competitive.

13 Plaintiffs observe that, after a lengthy investigation, the DOJ concluded that Defendants
14 engaged in *per se* violations of the antitrust laws that suppressed the compensation of their
15 employees. Plaintiffs do not agree that their claims are limited to allegations of a single
16 agreement among all Defendants, or that the precise shape of the conspiracy is a question that can
17 be resolved at the pleading stage. Plaintiffs do not agree that the question of injury-in-fact can be
18 resolved on a motion to dismiss. Plaintiffs also do not agree that whether Rule of Reason or *per se*
19 analysis applies can be determined on a motion to dismiss. In fact, Defendants’ agreements,
20 which were naked conspiracies not to recruit each others’ employees, is *per se* illegal.
21 Defendants’ joint motion will not dispose of the case and Defendants’ requested stay will simply
22 introduce unnecessary cost and delay.

23 **XVI. Expedited Schedule**

24 Plaintiffs believe their complaint is more than sufficient to state a claim and that
25 challenges to the complaint will unnecessarily delay the proceedings. Plaintiffs believe a stay of
26 discovery will unnecessarily delay the resolution of this case.

1 Plaintiffs are amenable to handling this case on an expedited basis with streamlined
 2 procedures. For instance, Plaintiffs believe that expedited production of documents Defendants
 3 already produced to the DOJ is appropriate, in addition to identification of percipient witnesses.

4 Defendants believe that the joint motion to dismiss should dispose of the entirety of
 5 Plaintiffs' Complaint and that its consideration would expedite the resolution of the case.
 6 Defendants believe the motion may be decided on the pleadings, and without any discovery. For
 7 those reasons, Defendants contend that the Court should stay discovery unless and until Plaintiffs
 8 can allege at least one valid claim.

9 Defendants also believe, as recognized by the Supreme Court in *Twombly*, 550 U.S. at
 10 556, that a stay is particularly appropriate in complex antitrust cases such as this one, where the
 11 burden of requiring Defendants to engage in broad, costly and invasive discovery should only be
 12 shouldered if this Court determines that Plaintiffs can plead a viable claim.

13 As detailed above, Defendants have offered to stipulate to an expedited briefing schedule
 14 on the motion for temporary stay of discovery. Defendants have further indicated that they intend
 15 to fully comply with discovery deadlines pending resolution of the motion to stay.

16 Again, Plaintiffs do not agree that Defendants' joint motion is proper or that it can
 17 possibly dispose of the case. Furthermore, this case bears no resemblance to *Twombly*. In
 18 *Twombly*, the plaintiffs failed to allege facts plausibly suggesting the defendants had violated the
 19 antitrust laws. Here, the defendants have entered into stipulated judgments with the Department
 20 of Justice in cases alleging they violated the Sherman Act. Defendants' position simply illustrates
 21 the absurd lengths to which admitted violators of the antitrust laws have attempted to extend
 22 *Twombly*.

23 **XVII. Scheduling**

24 **A. Plaintiffs' Position**

25 Plaintiffs believe that if discovery is allowed to proceed without delay (beginning with
 26 production of the documents Defendants already produced to the DOJ and identification of
 27
 28

percipient witnesses), trial may begin on February 17, 2014. Plaintiffs propose the following schedule:

<u>Event</u>	<u>Date</u>
Production of documents Defendants produced to the DOJ and identification of percipient witnesses:	November 15, 2011
Last day for Defendants to produce employee data: ³	December 15, 2011
Substantial completion of rolling production of other documents:	April 17, 2012
Motion for class certification	May 15, 2012
Class certification oppositions	June 15, 2012
Class certification reply:	July 13, 2012
Class Certification Hearing	August 16, 2012 or at convenience of Court.
Discovery cutoff (non-expert):	February 15, 2013
Rule 26 expert disclosures:	March 15, 2013
Production of material on which experts relied per Rule 26 or stipulation of the parties ("Expert Materials"):	March 20, 2013
Rule 26 supplemental expert disclosures:	April 16, 2013
Production of Expert Material for supplemental expert disclosures:	April 19, 2013
Discovery cutoff (expert):	May 15, 2013
Last day to file dispositive motions:	June 14, 2013
Dispositive motions oppositions:	July 12, 2013

³ Based on experience in other cases, Plaintiffs believe that certain relevant statistical and other information regarding the class may be maintained in databases or other computerized systems. This sort of information is routinely produced in antitrust class actions. Ordinarily, it can be produced quickly because it requires no searching or privilege or relevancy review. Indeed, it appears Defendants have identified and analyzed this data based on their representations regarding composition of the class in their portion of Discovery Dispute Joint Report #1. (Dkt. No. 76 at 9: "Plaintiffs have alleged a putative class of over 83,000 nationwide employees") Plaintiffs intend to specify the data they seek in this regard no later than October 20, 2011. To date, Defendants have refused to disclose their ESI systems and have not described how they maintain data that will be relevant to expert analysis regarding class-wide impact and damages. This data is responsive to requests Plaintiffs served on October 3, 2011, and includes information such as total compensation to class members before, during, and after the conspiracy period.

<u>Event</u>	<u>Date</u>
Dispositive motions replies:	August 12, 2013
Hearing on any dispositive motions:	September 19, 2013 or at convenience of Court.
Pretrial conference:	January 15, 2014
Trial:	February 17, 2014 (15 trial days)

B. Defendants' Position

Defendants believe that discovery should be postponed unless and until Plaintiffs have satisfied the Court that they can state at least one valid claim. Defendants accordingly propose the following schedule:

<u>Event</u>	<u>Date</u>
Hearing on Motion for Temporary Stay	December 8, 2011
Hearing on Motions to Dismiss	January 26, 2012
If any claims survive the Motions to Dismiss, Defendants' Written Responses and Objections to First Set of Discovery Due ⁴	February 26, 2012
Deadline for Amending Pleadings	May 15, 2012
Substantial completion of rolling production of documents (subject to discovery motion practice):	July 13, 2012
Motion for class certification	August 15, 2012
Class certification oppositions	October 15, 2012
Class certification reply:	November 15, 2012
Class Certification Hearing	December 15, 2012 or at convenience of Court.
Discovery cutoff (non-expert):	June 14, 2013
Rule 26 expert disclosures by the party bearing the burden of proof on an issue:	July 15, 2013

⁴ This proposed date and the subsequent proposed schedule is premised on initial discovery responses being due 30 days after the Court rules on Defendants' joint motion to dismiss.

<u>Event</u>	<u>Date</u>
Production of material on which experts relied per Rule 26 or stipulation of the parties ("Expert Materials"):	July 19, 2013
Rebuttal expert disclosures:	August 30, 2013
Production of Expert Materials for rebuttal expert disclosures:	September 5, 2013
Discovery cutoff (expert):	October 15, 2013
Last day to file dispositive motions:	November 15, 2013
Dispositive motions oppositions:	December 22, 2013
Dispositive motions replies:	January 22, 2014
Hearing on any dispositive motions:	February 14, 2014 or at convenience of Court.
Pretrial conference:	March 15, 2014
Trial:	April 15, 2014

XVIII. Trial

Plaintiffs demand trial by jury. Plaintiffs currently estimate the length of trial to be 15 days.

XIX. Disclosure of Non-party interested Entities or Persons

All parties have filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-16. Other than the named parties, there are no entities known by the parties to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

1 Dated: October 19, 2011

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

2
3 By: /s/ Joseph R. Saveri

Joseph R. Saveri

4 Joseph R. Saveri (State Bar No. 130064)

5 Eric B. Fastiff (State Bar No. 182260)

6 Brendan P. Glackin (State Bar No. 199643)

7 Dean M. Harvey (State Bar No. 250298)

8 Anne B. Shaver (State Bar No. 255928)

9 Katherine M. Lehe (State Bar No. 273472)

275 Battery Street, 29th Floor

San Francisco, CA 94111-3339

Telephone: (415) 956-1000

Facsimile: (415) 956-1008

Interim Lead Counsel for Plaintiffs and the Proposed Class

11 Dated: October 19, 2011

O'MELVENY & MYERS LLP

12
13 By: /s/ Michael F. Tubach

Michael F. Tubach

14 George Riley

15 Michael F. Tubach

Lisa Chen

16 Christina J. Brown

Two Embarcadero Center, 28th Floor

17 San Francisco, CA 94111

Telephone: (415) 984-8700

18 Facsimile: (415) 984-8701

Attorneys for Defendant APPLE INC.

1 Dated: October 19, 2011

KEKER & VAN NEST LLP

2
3 By: /s/ Daniel Purcell

Daniel Purcell

4 John Watkins Keker
5 Daniel Purcell
6 Eugene Morris Page
7 Paula Lenore Blizzard
8 710 Sansome Street
9 San Francisco, CA 94111
10 Telephone: (415) 381-5400
11 Facsimile: (415) 397-7188

Attorneys for Defendant LUCASFILM LTD.

12 Dated: October 19, 2011

JONES DAY

13 By: /s/ David C. Kiernan

David C. Kiernan

14 Robert A. Mittelstaedt
15 Craig A. Waldman
16 David C. Kiernan
17 Catherine T. Broderick
18 Craig E. Stewart
19 555 California Street, 26th Floor
20 San Francisco, CA 94104
21 Telephone: (415) 626-3939
22 Facsimile: (415) 875-5700

Attorneys for Defendant ADOBE SYSTEMS, INC.

1 Dated: October 19, 2011 JONES DAY

2
3 By: /s/ Robert A. Mittelstaedt
Robert A. Mittelstaedt

4 Robert A. Mittelstaedt
5 Craig A. Waldman
6 David C. Kiernan
7 Catherine T. Broderick
8 Craig E. Stewart
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

9 *Attorneys for Defendant INTUIT INC.*

10 Dated: October 19, 2011 MAYER BROWN LLP

11
12 By: /s/ Lee H. Rubin
Lee H. Rubin

13 Lee H. Rubin
14 Edward D. Johnson
Donald M. Falk
Two Palo Alto Square
15 3000 El Camino Real, Suite 300
16 Palo Alto, CA 94306-2112
Telephone: (650) 331-2057
17 Facsimile: (650) 331-4557

18 *Attorneys for Defendant GOOGLE INC.*

19 Dated: October 19, 2011 BINGHAM McCUTCHEN LLP

20
21 By: /s/ Zachary J. Alinder
Zachary J. Alinder

22 Donn P. Pickett
23 Frank M. Hinman
Zachary J. Alinder
24 Three Embarcadero Center
San Francisco, CA 94111
25 Telephone: (415) 393-2000
Facsimile: (415) 383-2286

26 *Attorneys for Defendant INTEL CORPORATION*

1 Dated: October 19, 2011

COVINGTON & BURLING LLP

2
3 By: /s/ Emily J. Henn

Emily Johnson Henn

4 Robert T. Haslam, III
5 Emily Johnson Henn
6 333 Twin Dolphin Drive, Suite 700
7 Redwood City, CA 94065
8 Telephone: (650) 632-4700

Attorneys for Defendant PIXAR

9 **ATTESTATION:** Pursuant to General Order 45, Part X-B, the filer attests that concurrence in
10 the filing of this document has been obtained from all signatories.
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28